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S Samdaran a/l Sivasamy v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO C-05–292–12 OF 2013
AZIAH ALI, AHMADI ASNAWI AND ABDUL RAHMAN SEBLI JJCA
3 DECEMBER 2014

C *Criminal Procedure — Sentencing — Appeal against sentence — Accused person convicted and sentenced to 14 years imprisonment — Offence of gang robbery — Deceased suffocated to death — Whether sentence excessive — Penal Code s 396*

D The deceased in this case, a 66 year-old woman, was found lying on the floor with her hands and legs tied. Her mouth and face were also tied, the mouth with cellotape and the face with cloth. The pathologist's ('SP2') evidence revealed that the deceased had suffocated to death. According to SP2 the injuries on the head, chest and upper and lower limbs were consistent with force blunt trauma. The lead that led to the arrest of the appellant was the E discovery by the police forensic team of his fingerprint lifted from a bottle found in the deceased's house. The appellant was convicted for the alternative charge of gang robbery with murder under s 396 of the same Penal Code and was sentenced to 14 years imprisonment. This was the appellant's appeal against the sentence. The sole ground of appeal was that the sentence was F manifestly excessive.

Held, dismissing the appeal:

(1) For what the appellant and his accomplices did, the sentence of 14 years imprisonment was not manifestly excessive or wrong in law. The G appellant should consider himself lucky that the trial judge did not impose any sentence of whipping. There was no merit in the appellant's appeal against the sentence and the sentence of 14 years imprisonment passed by the court below was affirmed (see paras 13 & 16).

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[Bahasa Malaysia summary

Si mati dalam kes ini, wanita berumur 66 tahun, didapati terbaring di atas lantai dengan tangan dan kakinya diikat. Mulut dan muka juga diikat dengan *cellotape* dan muka dengan kain. Keterangan ahli patologi menunjukkan bahawa si mati sesak nafas sehingga mati. Mengikut SP2 kecederaan ke atas kepala, dada dan bahagian atas dan bawah kaki adalah konsisten dengan trauma tumpul yang kuat. Petunjuk yang membawa kepada penangkapan perayu adalah dapatan oleh pasukan polis forensik terhadap cap jarinya yang diperolehi daripada botol di dalam rumah si mati. Perayu disabitkan untuk tuduhan alternatif rompakan berkumpulan dengan pembunuhan di bawah s 396 Kanun Keseksaan dan dihukum penjara selama 14 tahun. Ini adalah rayuan perayu terhadap hukuman. Satu-satunya alasan rayuan adalah bahawa hukuman adalah terlalu berlebihan.

Diputuskan, menolak rayuan:

(1) Daripada apa yang dibuat oleh perayu dan rakan-rakan subahatnya, hukuman penjara 14 tahun bukan terlalu berlebihan atau salah dari segi undang-undang. Perayu perlu menganggap dirinya bernasib baik bahawa hakim perbicaraan tidak mengenakan apa-apa hukuman sebatan. Tidak terdapat merit dalam rayuan perayu terhadap hukuman dan hukuman perjara 14 tahun yang dikenakan oleh Mahkamah Tinggi adalah disahkan (lihat perenggan 13 & 16).]

Notes

For cases on appeal against sentence, see 5(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3823–3939.

Cases referred to

PP v Shahrul Azuwan bin Adanan & Anor [2013] 8 MLJ 70; [2013] 2 CLJ 686, HC (refd)

Legislation referred to

Penal Code ss 302, 396
Penal Code (Amendment) Act 2003 s 10

Appeal from: Criminal Trial No 45B-62–10 of 2011 (High Court, Temerloh)

K Viknesvaran (Viknes Ratna & Co) for the appellant.
Kee Wei Lon (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Rahman Sebli JCA:

[1] The appellant together with another person was initially charged with murder under s 302 of the Penal Code but after the 11th witness had given evidence the prosecution offered an alternative charge of gang robbery with murder under s 396 of the same Code. The appellant pleaded guilty to the alternative charge but his co-accused claimed trial. The appellant was sentenced to 14 years imprisonment with effect from the date of his arrest while his co-accused was acquitted and discharged at the end of the prosecution case without his defence being called.

[2] This is the appellant's appeal against the sentence. The sole ground of appeal is that the sentence is manifestly excessive. The alternative charge against the appellant reads as follows:

> Bahawa kamu bersama-sama pada 12/9/2011 jam di antara 10.30 malam sehingga 13/9/2011 lebih kurang 1.45 petang, bertempat di rumah No. 3, Taman Bumi Cemerlang, Ketari, di dalam Daerah Bentong, di dalam Negeri Pahang Darul Makmur, telah melakukan rompak berkumpul bersesama dengan dua yang lain dan pada melakukan rompak berkumpul tersebut, telah membunuh Kaliamal a/p Kavandinia Gounder KPT: 450902-71-5004, dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 396 Kanun Keseksaan.

[3] As can be seen from the charge three persons inclusive of the appellant were involved but apparently the third person got away without being charged. The offence upon conviction carries the death penalty or imprisonment of up to 30 years and if the offender is not sentenced to death is also liable to whipping. Without a doubt the offence under s 396 of the Penal Code is a serious offence.

[4] The facts. On 13 September 2011 at about 1am shop assistant Murugan a/l Kalairajan ('SP3') had gone to the deceased's house to check out on her as she failed to turn up at her retail shop as usual that day. Her house was located just behind the shop and she was staying alone. When SP3 reached the house the front door was locked, so he entered through the back door which was ajar. As he entered the house he saw the deceased lying on the floor with her hands and legs tied. Her mouth and face were also tied, the mouth with cellotape and the face with cloth. She was already dead.

[5] The pathologist's ('SP2') evidence revealed that the late 66 year old Kaliamal a/p Kavandinia Gounder had suffocated to death, ie she died because she could not breathe. The following were SP2's physical findings on the deceased's body at the scene of crime:

(a) three layers of ligatures were tied around the head as follows (from outermost to innermost):

(i) a green batik cloth (140cm long) was tied around the head with a double knot at the left back of the head. It covered the part of the face from the eyes down to the chin. There was mucous fluid on the part that covered the nose;

(ii) a white cloth (98cm long) was tied around the head, covering the mouth and chin, with a double knot at the left back of the head; and

(iii) a light green cloth (35cm long) with attached cellotape (64cm long) covered the mouth. Only the cellotape part encircled around the head. Secretions were noted at the cloth;

(b) two layers of ligatures were tied around both wrists as follows (from outermost to innermost):

(c) a blue *pelikat* cloth (124cm long) tied both wrists together, with both palms facing the body and the left wrist crossing over the right wrist. On removing the ligature, a double knot was first noted at the front, then a double knot at the back, and finally a single knot at the front again;

(d) a cellotape (92cm long) encircled both the wrists together three times; and

(a) a dark blue-pink long dress (149cm long) was tied around both ankles. On removing the ligature, a double knot was first noted at the front. It later encircled both ankles again.

[6] SP2 found various injuries to the deceased's head, face and neck and there were also injuries to her ribcage as follows:

(a) fractures of the right second and fifth ribs;

(b) fracture of the right seventh rib;

(c) fracture of the right sixth rib;

(d) fractures of the left fourth and fifth ribs; and

(e) haematoma at the left seventh rib.

[7] According to SP2 the injuries on the head, chest and upper and lower limbs were consistent with force blunt trauma. In lay man's term these were injuries caused by physical force with blunt objects. On being questioned by the court SP2 testified that the cellotape that covered the deceased's mouth was

applied tightly around the mouth while her nose was covered with the outer layer of the cloth.

[8] The lead that led to the arrest of the appellant was the discovery by the police forensic team of his fingerprint lifted from a bottle found in the deceased's house. Thus it was evidence left behind unwittingly by the appellant himself that enabled the public prosecutor to bring him to justice.

[9] It is trite principle that an appellate court will not interfere willy nilly with the sentence passed by the lower court. The mere fact that the appellate court might have passed a different sentence is not a valid reason to interfere with the sentence. That will be an unlawful interference with the discretion vested in the sentencing court. The appellate court will only interfere if it is shown that the discretion had not been exercised judiciously in the sense that the sentence passed is illegal, or is manifestly inadequate or excessive, or that the sentencing judge or magistrate had considered irrelevant factors while ignoring relevant factors or had given insufficient or undue weight to some of the proved facts.

[10] The appellate court will also interfere if the sentence is not appropriate and not fitting to the circumstances of the crime or does not sufficiently reflect the gravity of the offence or public abhorrence or disapproval for that particular type of criminal conduct. A balance must of course be struck between the interest of the offender and the interest of the public but whatever may be the factors that the court has to consider in passing sentence, the interest of the public must take precedence over and above any other consideration.

[11] The criminal law is publicly enforced and the court owes it to the public to ensure that criminals in their midst are properly dealt with. It is wrong for the court to be lenient towards the offender without proper regard for the larger interest of the public. I had occasion to deal with the matter of sentencing in *Public Prosecutor v Shahrul Azuwan bin Adanan & Anor* [2013] 8 MLJ 70; [2013] 2 CLJ 686 where I reiterated as reproduced below what my brother judges past and present have said before:

> In passing sentence it is natural for the sentencing judge or magistrate to be sympathetic towards the offender. Invariably the offender cuts a lonely figure as he stands alone and subdued in the dock to face punishment. His demeanour, where he is charged with a crime involving the use of violence will be in total contrast with his conduct at the time he committed the offence. His plea in mitigation can sometimes be loaded with emotion, pleading all the usual problems of life. In such situation it is very easy to be swayed by sympathy but this is where the court must stand firm and not shirk from its responsibility to deal properly with evildoers.

[12] In the present case the life of an innocent and defenceless elderly

woman was cruelly cut short by a ruthless gang of robbers in the safety of her own house. Her hands and legs were tied, her mouth gagged tightly with cellotape and her face including her nose tied with cloth. The way she was treated can only be described as inhuman. There was total disregard for her safety and dignity. After tying her up the appellant and his partners in crime left her to die on the floor. It is not hard to imagine that she must have struggled in vain gasping for air before her life slipped away, not to mention the terrifying moments she had to endure when the robbers first struck.

[13] The photos at pp 152–155 of the record of appeal show some extent of the appellant's and his accomplice's repulsive behaviour. For what the appellant and his accomplices did, can the sentence of 14 years imprisonment be considered to be manifestly excessive or wrong in law? We do not think so, far from it notwithstanding the fact that the appellant pleaded guilty to the alternative charge at the first available opportunity. In fact the appellant should consider himself lucky that the learned judge did not impose any sentence of whipping.

[14] The Legislature vide s 10 of the Penal Code (Amendment) Act 2003 (Act A1210) had in its wisdom increased the length of imprisonment sentence for this offence from 20–30 years. This reflects Parliament's concern over the rise in the number of cases involving gang robbery with murder. The object behind the amendment is obvious, and that is to punish the offenders with longer imprisonment sentences where the court is not minded to pass the death sentence.

[15] The courts being enforcers of the law must carry this object into effect and not defeat the object by imposing unreasonably lenient sentences. These are only annoying and does not serve as a deterrent. It is counter productive and gives the wrong signal to the public. As has often been said the public will lose confidence in the courts if evildoers are not dealt with properly. The courts must therefore consistently send a clear signal to those who think of committing crimes, especially crimes of violence that they will pay a very heavy price if they are caught and brought to justice. It is only through the sentences passed by the courts that the message will get through to the public.

[16] For reasons aforesaid we found no merit in the appellant's appeal against sentence and we therefore affirmed the sentence of 14 years imprisonment passed by the court below.

A *Appeal dismissed.*

Reported by Afiq Mohamad Noor

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